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Can nonstatutory federal climate litigation drive federal climate policy?

David Markell

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This article reviews two relatively recent lawsuits that invoke *nonstatutory* federal law in an effort to persuade courts to provide judicial direction to address climate change, *Alec L. v. Jackson*, 863 F. Supp. 2d 11 (D.D.C. 2012), *aff'd sub nom. Alec L. ex rel. Loorz v. McCarthy*, 561 F. App'x 7 (D.C. Cir. 2014), and *Juliana v. Obama* (now *Juliana v. United States*), 217 F. Supp. 3d 1224 (D. Or. 2016).

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A few observations concerning climate change litigation may provide helpful context. A 2017 United Nations [study](#) documents that the United States is at the forefront of a global increase in climate change-related litigation. The Supreme Court's seminal decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), opened the door in the United States for federal regulation of greenhouse gas emissions under the Clean Air Act and has spawned a substantial amount of litigation involving that act. A considerable body of case law has also emerged addressing agency responsibilities under other statutes, including the National Environmental Policy Act (NEPA), several state "little NEPAs," and the Endangered Species Act. For a comprehensive empirical study of the 201 pieces of climate change litigation matters filed through 2010, see David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business As Usual?* 64 FLA. L. REV. 15 (2012). For a current breakdown of cases, see the Columbia Law School Sabin Center's [website](#).

The Court's second significant climate change decision, *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011), "shuts the judicial door" to suits to reduce greenhouse gas emissions based on federal common law nuisance. The Court held that Congress's authorization of the U.S. Environmental Protection Agency in the Clean Air Act to develop greenhouse gas emission standards "displaces" courts' authority to establish such standards under the federal common law. In the Court's words, when Congress has addressed a question, "the need for such an unusual exercise of law-making by federal courts disappears." 564 U.S. at 423. In *Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), the Ninth Circuit extended the Court's displacement rationale to include federal common law nuisance actions for damages. The Ninth Circuit held that, "if a cause of action is displaced, displacement is extended to all remedies." 696 F.3d at 857.

In the two recent cases cited above, plaintiffs have sought to invoke the "federal public trust doctrine" to galvanize the federal courts to chart their own course in the climate change arena. The plaintiffs in *Alec L. v. Jackson* asked the U.S. District Court for the District of Columbia to hold that the atmosphere is a public trust resource; that the United States government, as a trustee, has a fiduciary duty to protect that resource; and that the defendants have violated their fiduciary duties by "contributing to and allowing unsafe amounts of greenhouse gas emissions in to the atmosphere." The plaintiffs asked the court to enjoin the six defendant federal agencies to "take all necessary actions" to cap emissions of carbon dioxide by December 2012 and to ensure a decline of such emissions by at least 6 percent per year beginning in 2013.

The U.S. Court of Appeals for the D.C. Circuit affirmed the district court's decision to dismiss plaintiffs' claims that the doctrine imposes duties on the federal government and that "the defendants ha[d] abdicated their trust duty to protect the atmosphere from irreparable harm" by failing to reduce global atmospheric carbon dioxide levels to less than 350 parts per million during the century. The court found that it lacked subject matter jurisdiction over the claims, concluding that the Supreme Court has held that the public trust doctrine "remains a matter of state law" and does not provide for a federal cause of action.

The Oregon district court's decision in *Juliana v. United States* offers a very different perspective on the role of the federal courts and the viability of federal public trust doctrine claims in shaping climate change policy. In essence, the plaintiffs' claim in *Juliana* is that the federal governments' fossil fuel policies, in the aggregate, violate the plaintiffs' rights under the federal public trust doctrine and the U.S. Constitution by failing to protect the atmosphere, water, seas, seashores, and wildlife. To borrow the district court's summary, the case "alleges that defendants' actions and inactions—whether or not they violate any specific statutory duty—have so profoundly damaged our home planet that they threaten plaintiffs' fundamental constitutional rights to life and liberty." 217 F. Supp. 3d at 1261.

Characterizing the case as an "action . . . of a different order than the typical environmental case," the court held that "the right to a climate system capable of sustaining human life is fundamental to a free and ordered society." *Id.* at 1250. The court further held that the due process and equal protection clauses of the U.S. Constitution prohibit the federal government from interfering with this right, as does the public trust doctrine, which the court found to be implicit in the due process clause.

The court declined to dismiss plaintiffs' claims, setting the case for trial in February 2018. At this writing, the U.S. Court of Appeals for the Ninth Circuit has determined that the federal government's petition for mandamus review of the lower court's decision "raises issues that warrant an answer." As a result, the fate of the litigation remains uncertain.

Two commentators, law professors Michael Blumm and Mary Christina Wood, have suggested that *Juliana* is "challenging the government's entire fossil-fuel policy, based on asserted constitutional rights to inherit a stable climate system." Michael C. Blumm & Mary Christina Wood, [*"No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*](#), 67 AM. U. L. REV. 101, 107 (forthcoming 2017). It is part of a "wave of atmospheric trust litigation"—a "campaign" that is a "full-scale, coordinated movement" that has "turned to the judiciary for eleventh-hour relief to force worldwide emissions reductions." *Id.* at 121.

Conclusions

In our 2012 comprehensive empirical study of climate change litigation matters, (David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business As Usual?* 64 FLA. L. REV. 15, 22 (2012)), Prof. J.B. Ruhl and I hypothesize that, because climate change poses significant new policy challenges, litigants might ask courts to chart new policy directions—to "craft[] a distinct climate change jurisprudence." Based on our empirical study, we concluded that, for the most part, courts have resisted efforts to make the judicial branch a direct arbiter of climate change policy.

Roger Martella of General Electric recently suggested that "industry should not 'underestimate' the creativity and strategic ability of . . . 'new era' climate cases." *In Wake of Harvey, CLF Targets*

Shell To Address Climate Under Water Law, INSIDE EPA/CLIMATE (Aug. 30, 2017). *Alec L and Juliana* are examples of efforts to turn to the judiciary for help in addressing climate change (state common law cases are another example of such efforts). Record fundraising by some environmental nongovernmental organizations and transformative advances in monitoring capacity and related fields are likely to fuel such initiatives. The significant implications for climate policy and our system of government suggest that courts' efforts to grapple with a wide array of "new era" climate cases will bear watching.